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In the Supreme Court of the United States

OCTOBER TERM, 1965

No.

UNITED STATES OF AMERICA, APPELLANT

v.

RAY S. FISHER

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the district court dismissing the indictment (App., *infra*, pp. 15–28; R. 23–37),[1] and the opinion denying the government's petition for a rehearing (App., *infra*, pp. 31–34; R. 42–45), are not reported.

JURISDICTION

By order entered on March 4, 1965, the district court dismissed the indictment on the ground that appellee had previously acquired immunity against

[1] "R." refers to the certified record. "H." refers to the transcript of the hearing on the motion to dismiss. "G.J." refers to the transcript of appellee's testimony before the grand jury (Def. Ex. 2).

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prosecution pursuant to 29 U.S.C. 521. An order denying a petition for rehearing was entered on July 26, 1965. The United States filed a notice of appeal to this Court on August 25, 1965. This appeal is taken pursuant to 18 U.S.C. 3731, which confers jurisdiction on this Court to review on direct appeal an order of a district court dismissing an indictment in response to a motion in bar. See *United States* v. *Monia*, 317 U.S. 424.

STATUTES INVOLVED

Section 505 of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 537, 29 U.S. C. 186, provides in pertinent part:

> Subsections (a), (b), and (c) of section 302 of the Labor Management Relations Act, 1947, as amended [29 U.S.C. 186 (a), (b), and (c)], are amended to read as follows:
>
> * * * * *

Section 601 of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat 539, 29 U.S.C. 521, provides:

> (a) The Secretary shall have power when he believes it necessary in order to determine whether any person has violated or is about to violate any provision of this Act (except title I or amendments made by this Act to other statutes) to make an investigation and in connection therewith he may enter such places and inspect such records and accounts and question such persons as he may deem necessary to enable him to determine the facts relative thereto. The Secretary may report to interested persons or officials concern-

ing the facts required to be shown in any report required by this Act and concerning the reasons for failure or refusal to file such a report or any other matter which he deems to be appropriate as a result of such an investigation.

(b) For the purpose of any investigation provided for in this Act, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16 [*sic*], 1914, as amended (15 U.S.C. 49, 50), are hereby made applicable to the jurisdiction, powers, and duties of the Secretary or any officers designated by him.

Section 607 of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 540-541, 29 U.S.C. 527, provides:

In order to avoid unnecessary expense and duplication of functions among Government agencies, the Secretary may make such arrangements or agreements for cooperation or mutual assistance in the performance of his functions under this Act and the functions of any such agency as he may find to be practicable and consistent with law. The Secretary may utilize the facilities or services of any department, agency, or establishment of the United States or of any State or political subdivision of a State, including the services of any of its employees, with the lawful consent of such department, agency, or establishment; and each department, agency, or establishment of the United States is authorized and directed to cooperate with the Secretary and, to the extent

permitted by law, to provide such information and facilities as he may request for his assistance in the performance of his functions under this Act. The Attorney General or his representative shall receive from the Secretary for appropriate action such evidence developed in the performance of his functions under this Act as may be found to warrant consideration for criminal prosecution under the provisions of this Act or other Federal law.

Section 9 of the Federal Trade Commission Act of September 26, 1914, as amended, 38 Stat. 722, 15 U.S.C. 49, provides in pertinent part:

> [T]he commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of * * * documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may adminster oaths and affirmations, examine witnesses, and receive evidence.
>
> * * * * *
>
> No person shall be excused from attending and testifying or from producing documentary evidence before the commission or in obedience to the subpoena of the commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the commission in obedience to a subpoena issued by it * * *.

QUESTION PRESENTED

Whether the immunity granted by Section 601 of the Labor-Management Reporting and Disclosure Act (29 U.S.C. 521) to a witness who testifies under compulsion of an administrative subpoena issued by the Secretary of Labor in the course of an investigation conducted by the Secretary, extends to a witness who testifies before a grand jury investigating alleged violations of Section 302 of the Labor-Management Relations Act, as amended by Section 505 of the Labor-Management Reporting and Disclosure Act (29 U.S.C. 186), in view of the proviso in Section 601 of the latter Act which authorizes the Secretary of Labor to investigate "any provision of this Act (*except * * * amendments by this Act to other statutes*)" [emphasis added].

STATEMENT

An indictment returned in the United States District Court for the District of New Jersey charged appellee and one Peter W. Weber with conspiring to violate 29 U.S.C. 186(b) by permitting Weber to receive things of value from companies whose employees he represented, and with several substantive violations of 29 U.S.C. 186 (a), (b), and (d) (R. 1–10). After a hearing, the district court dismissed the indictment as to appellee on the ground that, having testified before a grand jury concerning the subject matter of the indictment, he was entitled to immunity from prosecution under the provisions of Section 601 of the Labor-Management Reporting and Disclosure Act.

1. The following facts were developed by the testimony and the exhibits at the hearing on the motion to dismiss:

Appellee was the president and major stockholder of Public Constructors, Incorporated, and a partner in Jersey Equipment Company, which rented cranes to Public Constructors. Weber was an officer of the union representing Public Constructors' employees and, until 1958, a stockholder of Public Constructors and a partner in Jersey Equipment. In 1958, both appellee and Weber testified about their relationships to the companies before the McClellan Committee, which was investigating improper activities in the labor-management field (Court Ex. 1).

In September 1961, the Department of Justice informed David M. Satz, Jr., the United States Attorney for the District of New Jersey, that it was investigating Public Constructors in regard to a collusive bidding matter (H. 5, 11–13). Mr. Satz later learned of the McClellan Committee testimony and realized that Public Constructors, appellee, and Weber might be guilty of violating Section 302 of the Labor Management Relations (Taft-Hartley) Act, which forbids payments by an employer to a representative of employees (H. 10–11, 14–15, 24–25, 43). Since the subject matter of such possible violations was also related to the reporting requirements of the Labor-Management Reporting and Disclosure (Landrum-Griffin) Act (see 29 U.S.C. 431–433) (H. 44), Mr. Satz, in November 1961, telephoned the local office of the Bureau of Labor-Management Reports to ascertain whether the Bureau had any pertinent informa-

tion (H. 11, 15–17, 43–44). He was informed that in 1960 Public Constructors had filed a report, as required by the Landrum-Griffin Act, disclosing payments to Weber, but that Weber had not filed any report, as also required by the Act, and that the Bureau, consequently, was conducting a routine investigation into possible violations of the Act (H. 17, 44–45, 70; Def. Ex. 6). In order to avoid a duplication of effort, Mr. Satz did not request an F.B.I. investigation of the Taft-Hartley violations, but instead asked that the Bureau of Labor-Management Reports furnish him with the results of their investigation as it progressed (H. 27, 33, 47–48). Several reports by investigators of that Bureau were thereafter sent to him (H. 39, 41–42, 122–125).

In December 1961, as a result of information furnished by the Bureau, Mr. Satz, on his own initiative and without any request by any representative of the Department of Labor (H. 44–45), applied for a federal district court subpoena to compel appellee, individually and as president of Public Constructors, to appear with company records before the grand jury on December 20 (H. 33, 45; Def. Ex. 1). At the outset of appellee's grand jury appearance, Mr. Satz formally advised him of his Fifth Amendment privilege and warned that any incriminating testimony might lead to his prosecution (G.J. 5, 9–10). Appellee replied that he understood (G.J. 5), thanked Mr. Satz for the warning (G.J. 10), and declined to sign a waiver of his privilege against self-incrimination (G.J. 6). Mr. Satz then examined him concerning company payments to Weber, basing his questions on

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the transcript of the McClellan Committee testimony and the information reported by the investigators (H. 36–37). Subsequently, on April 4, 1962, the present indictment was returned charging appellee and Weber with conspiracy and with several substantive Taft-Hartley violations (R. 1–10).

Three weeks after appellee's appearance before the grand jury, the Office of the Solicitor of the Department of Labor asked Mr. Satz how the United States Attorney's Office had become involved in investigating the case without a prior referral from the Department of Labor, as provided in the Memorandum of Understanding between the Departments of Labor and Justice.[2] Mr. Satz explained that the matter originally had arisen from the collusive bidding investigation by the Department of Justice, and pointed out that the investigation concerning possible Landrum-Griffin violations was being conducted exclusively by the Bureau of Labor-Management Reports. Mr. Satz and the Solicitor's Office agreed that the investigation of possible Taft-Hartley violations, with which Mr. Satz was concerned, was not a matter within the jurisdiction of the Department of Labor (R. 26–29; Def. Ex. 3).

2. The opinion accompanying the district court's order dismissing the indictment proceeds upon the following reasoning: The indictment charged violations of the Landrum-Griffin Act, matters which Section 601 of the Act places within the investigative province of the Secretary of Labor. The same section empowers the Secretary to subpoena a reluctant wit-

[2] F.R. 1708. See Def. Ex. 4; n. 3, pp. 10–11, *infra*.

ness and compel his testimony by an automatic conferral of immunity. The Secretary here delegated his investigative function to the United States Attorney, as permitted by Section 607 of the Act and the Memorandum of Understanding. Hence, when the United States Attorney subpoenaed respondent before the grand jury, he was acting as the Secretary's agent and the immunity provisions of the Secretary's subpoena power attached, precluding this prosecution (App., *infra*, pp. 18–28).

When, on petition for rehearing, it was suggested to the district court that the premise of its reasoning was inaccurate—that, rather than violations of the Landrum-Griffin Act, the indictment charged violations of the Taft-Hartley Act, over which the Secretary of Labor has no investigative power—the court assumed that the United States Attorney had been acting under a misapprehension as to the source of his authority, and held that in view of "the policy of the United States Supreme Court and general considerations of fair play," it must adhere to its original decision (App., *infra*, pp. 32–34).

THE QUESTION IS SUBSTANTIAL

The district court plainly erred in holding that the United States Attorney's investigation of Taft-Hartley violations was under a delegation of authority from the Secretary of Labor and that immunity attached to appellee's testimony before the grand jury under a judicial subpoena.

1. The investigation of the offenses charged in the indictment was not conducted under the authority of

the Secretary of Labor. He has no power to investigate Section 302 of the Taft-Hartley Act, as amended by Section 505 of the Landrum-Griffin Act. The investigation of violations of the Taft-Hartley Act has always been the province of the Department of Justice, and no transfer of that authority was intended or effected by Section 505. For, while Section 601(a) of the Landrum-Griffin Act conferred upon the Secretary of Labor the power to investigate violations of "any provision of this Act," it expressly excluded "amendments made by this Act to other statutes" (73 Stat. 519, 539); Section 505 is such an amendment.[3] Consequently, the investigation in this case of

[3] The district court erroneously characterized the charged offenses as violations of the Landrum-Griffin Act (App., *infra*, pp. 22–23). And in stating that the investigation of such violations was the province of the Secretary, the court did not cite Section 601(a) of that Act, but instead the rephrased version of Section 601(a) which appears in 29 U.S.C. 521(a) (App., *infra*, pp. 19, 22). That version changed the words "any provision of this Act" to "any provision of this chapter", and then omitted the exception for "amendments made by this Act to other statutes" to the grant of authority, the amendments encompassed in the exception having been printed in other chapters. Failure to recognize that Section 505 is not part of the Landrum-Griffin chapter in the United States Code (but part of the Taft-Hartley chapter) and hence not within the grant of investigative authority made by Section 601 was apparently one reason for the district court's failure to recognize that the Secretary of Labor was without investigative authority in this area; another was the Memorandum of Understanding between the Departments of Labor and Justice, which provides in the second introductory paragraph that the Secretary has no power to investigate Landrum-Griffin amendments to the Taft-Hartley Act, but which then, in paragraph 2(b)4, inadvertently includes Section 505 in a list of areas of delegated authority (Def. Ex. 4). As the Secretary had no such au-

suspected Taft-Hartley violations was conducted solely under the power of the Department of Justice, as the New Jersey representatives of the Departments had understood and intended (H. 26–29, 52–53; Def. Ex. 3). Although the United States Attorney used the services of Department of Labor investigators to gather preliminary information for the grand jury investigation, such cooperation was specifically authorized by the last sentence in Section 607 of the Landrum-Griffin Act (29 U.S.C. 527), and it did not alter the fact that the underlying authority was that of the Department of Justice.

2. In any event, immunity under Section 9 of the Federal Trade Commission Act, incorporated by reference in Section 601(b) of the Landrum-Griffin Act, does not attach to a witness who testifies before a grand jury under a subpoena issued by a district court. Section 9 provides that the Federal Trade Commission (here, the Secretary of Labor) shall have the power to issue subpoenas and conduct hearings, that prospective witnesses shall not be excused from attending and testifying "before the commission [Secretary] or in obedience to the subpoena of the commission [Secretary]" on the ground of self-incrimination, and that no witness shall be prosecuted as a result of anything concerning which he may testify "before the commission [Secretary] in obedi-

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thority, however, there was nothing that he could delegate. And there is no indication either that the United States Attorney was under a misapprehension that the Memorandum was the source of his authority to conduct the grand jury investigation or that appellee knew of and was misled by the Memorandum.

ence to a subpoena issued by it." Plainly, immunity attaches only to a witness testifying in an administrative hearing under an administrative subpoena.

In holding that the statute encompasses testimony before a grand jury as well, the district court improperly relied on this Court's interpretation of a different immunity statute (15 U.S.C. 32–33) in *United States* v. *Monia*, 317 U.S. 424. Far from being "substantially identical," as claimed by the district court (App., *infra*, p. 26), the two statutes are dissimilar in a material respect. In *Monia* the statute conferred immunity on a witness for testimony given "in any proceeding, suit, or prosecution." Such language, the Court held, is sufficiently broad to cover a grand jury proceeding. The language of the instant statute, in contrast, is expressly limited to proceedings before the Secretary, and therefore clearly does not embrace grand jury proceedings. See *Wirtz* v. *Robb*, 235 F. Supp. 913, 915 (E.D. Mich.). Congress, had it desired to confer a broader immunity, could have incorporated by reference the statute involved in *Monia* just as easily as Section 9 of the Federal Trade Commission Act. Where, as here, Congress limits the application of immunity to persons testifying under a particular subpoena power or in a certain kind of proceeding, the limitation is valid and must be given effect. See *United States* v. *Welden*, 377 U.S. 95, 107; *Sherwin* v. *United States*, 268 U.S. 369, 372–373; *Goodman* v. *United States*, 273 F. 2d 853, 856–857 (C.A. 8).[4]

[4] To be sure, if authority to investigate matters involving a Landrum-Griffin violation is specifically delegated by the Secre-

CONCLUSION

This case raises a substantial question which warrants resolution by this Court. It is respectfully submitted that probable jurisdiction should be noted and the judgment below reversed.

THURGOOD MARSHALL,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
RONALD L. GAINER,
Attorneys.

OCTOBER 1965.

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tary of Labor to a United States Attorney or other officer, and a witness testifies under a Department of Labor subpoena in an administrative investigation before that delegate, immunity would attach and subsequent similar testimony by the witness before a grand jury could not be made the basis of a prosecution. *In the matter of Certain Grand Jury Witnesses*, 211 F. Supp. 365 (E.D. Mich.); *Goldberg* v. *Battles*, 196 F. Supp. 749 (E.D. Pa.), affirmed, 299 F. 2d 937 (C.A. 3), certiorari denied, 371 U.S. 817. The district court here, however, found that immunity attached at the grand jury proceeding itself (App., *infra*, pp. 23–25). There was no earlier administrative investigation and, as we point out above, no delegation by the Secretary to the United States Attorney.

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Criminal No. 146–62

OPINION

UNITED STATES OF AMERICA

v.

PETER W. WEBER AND RAY S. FISHER, DEFENDANTS

Appearances:

DAVID M. SATZ, Jr., United States Attorney,
By: RICHARD A. LEVIN, Assistant United States Attorney,
For United States of America.

LORENTZ AND STAMLER, Esqs.,
By: JOSEPH H. STAMLER, Esq.,
For Defendant, Ray S. Fisher.

COOLAHAN, District Judge:

This motion before the Court presents a question of whether or not a person who has testified pursuant to a subpoena issued by the Department of Justice through the instrumentality of the United States Attorney for the District of New Jersey before the Grand Jury may under certain circumstances acquire immunity from prosecution under provisions of 29 U.S.C.A. § 521 and 15 U.S.C.A. § 49.

This motion is made on behalf of the defendant, Ray S. Fisher. After testimony was taken and briefs submitted, the Court took the matter under advisement to study the record and exhibits.

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It appears that the defendant Fisher is and was the president and a stockholder of Public Constructors, Inc. (hereafter referred to as Public) a corporation engaged in road and highway construction. The co-defendant named in the indictment, Peter W. Weber, is and was at all times herein business manager of Local 825 of International Union of Operating Engineers, members of which from time to time were employed by Public. Prior to the finding of the indictment in dispute, Weber had been a stockholder of Public and a partner in Jersey Equipment Co. Jersey Equipment Co. was and is a partnership engaged in the business of renting construction equipment to Public.

On January 27th, 28th, 29th, 30th and 31st, 1958 Fisher and Weber appeared before the Select Committee for the 85th Congress, Second Session, who were investigating improper activities in the Labor Management field. Fisher testified [1] concerning Weber's affiliation with the corporation of which Fisher was the president and as to their holdings in the partnership, Jersey Equipment Co. Weber gave testimony concerning his participation in the above named corporation and partnership and other matters.[2]

As a result of these hearings, the Labor Management Reporting and Disclosure Act of September 14, 1959, Public Laws 86–257 (Landrum-Griffin Act) was adopted by Congress. On December 29, 1960 Public filed its first "Employers Report" with the United States Department of Labor, pursuant to the Act.

According to the testimony, during the first three months of 1961 investigators of the Bureau of Labor

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[1] Transcript of proceeding before Select Committee on Improper Activities in the Labor Management field. Page 8229, Part 20.

[2] Transcript Page 8117, Part 20.

Management Reports visited the office of Public (Tr. p. 56) and conferred with employees of that corporation, examined its books and records, and stated that the purpose of the investigation was to uncover the affairs of Peter Weber (Tr. P. 55) and not Public or any officer of that company. Again, in November of 1961 the Bureau investigators returned to Public and met with Fisher and Mr. Boyd of that concern. When asked what the purpose of the investigation was they replied that their concern was with Peter Weber rather than Fisher (Tr. P. 67). The purpose of this visit was to explore some statements that Fisher had made at previous meetings and Fisher was asked if he would be willing to sign a written statement which the investigator of the Bureau would prepare. Fisher stated that he would not sign such statement until he had had his counsel review it. When the investigator was asked the purpose of the statement he replied, "Well, it might save you a trip to the Grand Jury." (Tr. P. 68).

Thereafter all of the reports and results of the investigation by the Labor Department investigators were sent to the Area Director of the Department of Labor, Richard Lally.

On or about November 20th or 21st the Area Director and one of the investigators appeared at the United States Attorney's Office for the purpose of a conference with that official. (Tr. PP. 123–4.) The tenor of the conversation concerned the verification of the reports concerning payments made to Weber (Tr. P. 124) and the investigation in general.

Some days prior to December 20, 1961 Fisher, pursuant to a telephone call made by the United States Attorney, was directed to bring certain corporation records before the Grand Jury (Tr. P. 78); and on December 20, 1961 in response to a subpoena previ-

ously served on him, Fisher appeared before the Grand Jury and gave testimony concerning the relationship of Weber and one Anna M. Rocha with the aforementioned corporation and partnership. During the course of the preliminary remarks before the Grand Jury, Fisher was advised of his right to avail himself of the privilege of the Fifth Amendment. He was further advised that in the event he sought to invoke the provisions of the Fifth Amendment the matter would be presented before a Federal District Judge who would then decide whether Fisher had proper grounds for asserting the privilege. In addition to the above, Fisher was asked to sign a waiver of immunity which he refused to do.

Inquiry was made of Fisher before the Grand Jury concerning Weber's affiliation with the corporation and partnership, personal use of vehicles owned by Public and on other matters concerning receipt of things of value from Public and Jersey Equipment Co. It is interesting to note that Weber was never called or subpoenaed to appear before the Grand Jury. The only other witnesses to appear, according to the record before the Court, were Fisher and the investigators of the Labor Department who had conducted the preliminary investigation. On April 4, 1962 the indictment, the subject matter of this action, was filed with the Clerk of the Court naming both Fisher and Weber as defendants.

Count one of the indictment charges defendants, Fisher and Weber, with conspiracy against the United States to violate Section 186(b) of Title 29, United States Code, by permitting and assisting Weber to agree to receive and accept money and things of value from Public Constructors, Inc., and Jersey Equipment Co., in violation of 18 U.S.C.A. § 371.

The other substantive counts charge Fisher with

violations of 29 U.S.C. § 186 (a), (d), in that he did allegedly pay, deliver and agree to pay and deliver to a labor representative, to wit, Weber, things of value of Public Constructors, Inc., and Jersey Equipment Co., during certain periods of time. The charges set forth in the indictment are related to and directly flow from the transactions and matters concerning which Fisher testified to before the Grand Jury and the Legislative Committee.

Section 521 of the Act gives the Secretary of Labor power to conduct investigations to determine violations of the L.M.R.D.A., with certain exception as to title I. This section gives the Secretary of Labor the power to grant immunity to persons appearing and giving evidence in response to a subpoena issued under the auspices of his department. The immunity statute utilized for the purpose is 15 U.S.C.A. §§ 49, 50, a provision of the Federal Trade Commission Act but herein made expressly applicable to Labor matters by the Congress.

Section 607 of the Act read in conjunction with Section 601 authorizes the Secretary to delegate certain of his powers to other Governmental Departments in order to avoid unnecessary expense and duplication of function among Governmental Agencies. To effectuate this intent, a Memorandum of Understanding between the Departments of Labor and Justice, dated February 16, 1960, has been executed, and provides in detail the division of the investigatory function to be allotted to each of the two departments. The types of criminal prosecutions are categorized and separated with certain crimes being reserved to the sole responsibility of the Secretary of Labor and other violations to be investigated by the Department of Justice through this delegation from the Secretary. Among these latter delegated crimes appear the sub-

stantive offenses with which Fisher is charged in the indictment forming the subject matter of this motion. See 25 Federal Register 39 (1960) (P. 1708).

This memorandum expressly provided that the Department of Justice was to proceed with such investigation by the authority of powers delegated from the Secretary of Labor which that official possessed under the enabling Act.

The powers of investigation so delegated by the Secretary of Labor to the Department of Justice could obviously not transcend the powers originally granted to the Secretary by Congress. The intent of the Legislature as gleaned from the Legislative history manifests their desire to grant the Secretary broad investigatory power along with substantial authority to delegate same to other Governmental Agencies in order to implement the Labor-Management protection policies enunciated in the purposes of the Act.

The Courts have passed upon the broad delegation of authority allotted under the Act and utilized in the Memorandum of Understanding and have upheld the validity of the underlying enabling legislation and the specific transfer of authority made pursuant thereto. *Goldberg* v. *Battles,* 196 F. Supp. 749, 755 (D.C. Pa. 1961), *aff'd.,* 299 F. 2d 937 (3d Cir. 1961), *cert. denied,* 371 U.S. 817 (1962). The *Battles* case expressly held:

> In summary the Court finds that the Secretary of Labor is authorized by § 601 of the Act to delegate his investigatory and subpoena functions; that he in fact did so delegate them to the Commissioner; that § 607 of the Act, read in conjunction with § 601, authorized the Commissioner to delegate his functions to the Department of Justice; and, that the Commissioner did in fact authorize the Department of Justice to conduct this investigation.

As stated previously the L.M.R.D.A. utilizes the immunity section of the Federal Trade Commission Act found in 15 U.S.C.A. § 49. That statute states:

> * * * But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the commission in obedience to a subpoena issued by it: Provided, That no natural person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying. Sept. 26, 1914, c. 311, § 9, 38 Stat. 722.

Through the years Congress has enacted some forty different immunity statutes. Among such statutes immunity may be imposed upon a defendant in several different ways. See 72 Yale Law Journal 1565 *et seq.* Certain statutes require that the Fifth Amendment be claimed before the witness will be immunized, while others grant immunity automatically upon the appearance and testimony of a witness before a designated body pursuant to an authorized subpoena. Among this latter type of mandatory or automatic immunity provision falls Section 49 relied on by the defendant Fisher. This statute was enacted in 1914 and has been interpreted through Judicial decision to immediately vest in the witness when he appears and testifies under subpoena. See *United States* v. *Monia,* 317 U.S. 424 (1943); *United States* v. *Pardue,* 294 Fed. 543 (S.D. Tex. 1923) and 72 Yale Law Journal 1565, 1602 (1963 Edition).

In *Goldberg* v. *Battles, supra,* the delegation of powers was expressly made to an attorney of the Department of Justice in order to question a witness under investigation for a violation of L.M.R.D.A. As stated before the validity of the delegation to the

Secretary and to the Department of Justice were upheld and the witnesses' claim of a deficient grant of immunity because of such delegation overruled. Consequently, it becomes clear that the Act in question is a valid Congressional enactment which would serve to immunize a person testifying in response to a subpoena issued directly by the Secretary of Labor or indirectly by some subofficer to whom express delegation has been made.

It is the position of the movant that such a delegation was herein made pursuant to the Memorandum of Understanding previously discussed, and that the subpoena issued by the United States Attorney was in reality issued as an extension of the powers granted to the Secretary of Labor whose offices govern all investigations and proceedings under the L.M.R.D.A. (with the exception of Title I).

The United States Attorney responds with the contention that Fisher was subpoened pursuant to an alleged investigation of certain anti-fraud charges. However, Fisher was not questioned on any matters concerning anti-fraud charges, but his interrogation before the United States Attorney and the Grand Jury was particularly focused upon Weber's affiliation with Public and Jersey Equipment Co., exactly the same matters which were investigated by the Labor Department. Significantly, the Department of Justice utilized the services of B.L.M.R. investigators rather than their own agents or operatives. Furthermore, the reports and discussions with Fisher were all made available to the United States Attorney prior to the issuance of the subpoena and the appearance of Fisher and the Labor investigators (who were also witnesses) before the Grand Jury. In any case, the indictment in question clearly charges Fisher with violations of the L.M.R.D.A. and does not touch upon any fraud or

other matters particularly within the province of the Justice Department.

The argument that the investigations concerned other crimes rather than the offenses carrying immunity privileges was made in the case of *United States* v. *Niarchos,* 125 F. Supp. 214 (D.D.C. 1954) and *United States* v. *Onassis,* 125 F. Supp. 190 (D.D.C. 1954). Those cases held that the immunity granted must be coextensive with the violations and crimes about which the witness will be questioned. In *Niarchos* the defendant had already been indicted in a previous case and the Government claimed the inquiry before the Grand Jury was for an entirely different offense. However, the subject matter of the questioning and the indictment was found to emanate from the Shipping Act and hence the defendant's immunity was broad enough to cover all facets of prosecution under this section including the prior charge. See also *United States* v. *Andolschek,* 142 F. 2d 503, 506 (2nd Cir. 1949).

In the case of *In Re Certain Grand Jury Witnesses,* 211 F. Supp. 365 (E.D. Mich. 1962) the Court held that witnesses immunized by the Secretary of Labor were likewise immunized in proceedings before a Grand Jury. In that case the witnesses first refused to testify before a Grand Jury in response to a subpoena issued by the United States Attorney and were subsequently subpoened by the Secretary of Labor and granted immunity, pursuant to 15 U.S.C.A. § 49. The witnesses were then returned to the Grand Jury proceedings and again claimed the Fifth Amendment. However, the Court held that the prior immunization was sufficient to preclude the witnesses from claiming the Fifth Amendment in the later proceedings inasmuch as the F.T.C. Immunity Act is co-extensive with the Constitutional guarantees of self incrimina-

tion and extends to witnesses testimony before the Grand Jury.

Both parties to this action claim the benefit of the decision in the above case. It is the Government's contention that the necessity of intervention by the Secretary is the necessary prerequisite to the proper granting of immunity in such cases. It is difficult to reconcile this formalistic approach with the liberal provisions of delegation of authority and automatic grant of immunity present in the statutes relevant to this matter. The mere interposition of the Secretary's subpoena does not change any of the actual elements when applied to the case at Bar. The information sought to be elicited from Fisher by the United States Attorney before the Grand Jury was to inure to the benefit of the Secretary pursuant to the performance of the function delegated under the Memorandum of Understanding. The investigators who uncovered the background material upon which Fisher was questioned were Bureau operatives directly under the supervision of the Secretary. The investigation being conducted was a Labor matter primarily against Weber and Rocha. The indictment founded charged Labor Law criminal violations. Much of the testimony had already been had before a Congressional Committee prior to the immunity enactment and hence was a matter of record not requiring Fisher's present testimony for its revelation. It cannot be argued that if the Secretary had directly subpoened Fisher he would be immunized. Instead of doing this the Secretary had agents interview Fisher and investigate the corporation's books. To allow a circumvention of the designated procedure by subpoening an unwary witness before the Grand Jury on the chance he may not claim his privilege and that immunity will not attach, would thwart the Congres-

sional policy promulgated in the enactment and would seriously cast doubt upon traditional notions of judicial fair play.

The Court does not mean to say that the United States Attorney had no right to subpoena Fisher or to conduct an investigation outside of the search for L.M.R.D.A. violations. If the subject matter of Fisher's testimony was anti-fraud then immunity would not necessarily attach unless it was a direct outgrowth of the testimony. See *Heike* v. *United States*, 227 U.S. 131 (1913) and *Monia, supra*. However, in the case at Bar the evidence as testified to by the various witnesses seems to overwhelmingly indicate that Fisher was subjected to inquiry concerning the Labor matters for which he was subsequently indicted. See *Niarchos, supra*.

Whether the actions of the Secretary and the United States Attorney were intentionally collusive in obtaining this information is immaterial to a decision where the facts so strongly indicate that both agencies were working hand in hand upon this matter. The law prescribes the allowable delegation and it was made. The information obtained was prepared and utilized by both the parties involved. The implementation of the subpoena through processes otherwise available to the United States Attorney (but not to the Secretary) will not change the substance of the transaction and hence cannot alter the result.

The Courts have protected witnesses testifying pursuant to immunity statutes where the enactment in question was not broad enough to prevent the use of evidence against that witness in a later proceeding. Therefore, in *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892) the Court indicated that nothing short of absolute immunity would justify compelling the witness to testify if the privilege was claimed. In the later

decision of *United States* v. *Pardue, supra,* the Court, in dealing with the Federal Trade Commission Act (in issue at Bar), held that it was unnecessary under this statute for the witness to claim the benefit of the immunity statute or the privilege against self-incrimination and that the burden shifted to the Government to show that, notwithstanding all of the indicia of compulsory testimony, the witness in fact waived his privilege and testified voluntarily. Where he is called to testify by subpoena the voluntary nature of any such testimony almost disappears (294 Fed. 599).

The zeal with which the Courts have protected the defendant in cases attempting to infringe his Fifth Amendment Constitutional rights and still prevent the granting of immunity are set out and discussed in the *Pardue* decision. See *Brown* v. *Walker,* 161 U.S. 591 (1896).

In the *Monia* case, *supra,* the United States Supreme Court construed the immunity provisions of the Sherman Act, 15 U.S.C.A. §§ 32, 33 which is substantially identical with 15 U.S.C.A. §§ 49, 50. In that case the appellees charged with conspiracy to fix prices in violation of the Anti-Trust Act testified before a Federal Grand Jury and gave testimony connected with indictments which were later found. Neither of the appellees made any claim of privilege under the Fifth Amendment before the Grand Jury. Subsequently they moved to dismiss the indictment and the District Court granted the motion. An appeal was had directly to the Supreme Court. Mr. Justice Roberts traced the historical evolution of the types of immunity statutes and concluded by affirming the lower Court. The opinion found the legislation involved in the case to be plain in its terms and on its face to mean to the layman that if he is subpoened and sworn and testifies he is to have immunity. The

Court specifically pointed out that the Government urged interpretation of the Act would create a trap for the witness. It reasoned that Congress could have clearly spelled out the procedure to be invoked if it did not wish the immunity to automatically attach as it did in other legislative enactments in the 1934–40 period.

More recently the present United States Supreme Court has handed down two decisions indicating a continuation of this policy of liberal construction of immunity provisions in an effort to protect the Constitutional rights of the effected witnesses. See *United States* v. *Weldon,* 377 U.S. 95 (1964) and *Murphy* v. *Waterfront Commission,* 378 U.S. 1 (1964). In the latter case the Court held that the immunity granted must apply to both State and Federal prosecutions and afford protection as against both sovereigns if it is to be operative to divest the claimant of his Fifth Amendment rights. This is a definite continuation and enlargement of the policy of the decisions heretofore mentioned. See also *Ullman* v. *United States,* 350 U.S. 422 (1956).

In *Weldon* (although dealing with a reverse factual situation), the decision of the Court is clear without doubt that the immunity provisions must apply to those testifying under subpoena in any Judicial proceeding which is brought under specific statutes such as the Commerce Act or the Sherman Act.

In *Hale* v. *Henkel,* 201 U.S. 43, 66 (1906) we find the following language: "While there may be some doubt whether the examination of witnesses before a Grand Jury is a suit or prosecution we have no doubt that it is a 'proceeding' within the meaning of this proviso. The word should receive as wide a construction as is necessary to protect the witness in his disclosures; whenever such disclosures are made in

pursuance of a Judicial inquiry, whether such inquiry be instituted by a Grand Jury, or upon the trial of an indictment found by them."

Concomitant with the above reasoning, where the Immunity Act specifies hearing before a Commission and the Commission may delegate authority thereunder to a sub-agent or associate department such as the United States Attorney, the proceedings continuing under their joint auspices must carry with it the granted immunity provision which is part and parcel of the same Legislative enactment.

In summary, this Court is of the opinion that the indictment found against Ray S. Fisher must be dismissed on the grounds that immunity attached to his appearance and testimony before the Grand Jury pursuant to a subpoena issued nominally by the Department of Justice but actually in accord with the Memorandum of Understanding entered into between that Department and the Secretary of Labor. Furthermore, the oral testimony has convinced this Court that the matters under investigation at the time of Fisher's interrogation were violations of the L.M.R.D.A. and explicitly within the statutory framework. The facts of the matter indicate that this was in reality the conduct of a Labor investigation and nothing further so as to insulate the Government against the application of the appropriate Immunity Statute.

Let counsel for defendants submit an appropriate order.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Criminal No. 146–62

JUDGMENT OF DISMISSAL

UNITED STATES OF AMERICA

vs.

PETER W. WEBER AND RAY S. FISHER, DEFENDANTS

This matter being brought before the Court by Lorentz and Stamler, Esqs., attorneys for the defendant, Ray S. Fisher, Joseph H. Stamler, Esq., appearing in the presence of Richard A. Levin, Assistant United States Attorney for the United States of America, upon a Notice of Motion to dismiss indictment number 146–62 and the Court having considered the testimony offered herein, and the Briefs presented by respective counsel and the oral argument of same and for the reasons set forth in the Opinion of the Court filed herein on February 11, 1965, it is on this 26th day of February, 1965,

ORDERED that indictment number 146–62 be and is hereby dismissed as against the defendant Ray S. Fisher only.

/s/ James A. Coolahan /s/,
JAMES A. COOLAHAN,
J.U.S.D.C.

The United States Attorney for the District of New Jersey hereby consents to the form of the within Judgment.

DAVID M. SATZ, JR.,
United States Attorney.

By Richard A. Levin,
RICHARD A. LEVIN,
Assistant United States Attorney
for the United States of America.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Criminal No. 146–62

OPINION

UNITED STATES OF AMERICA
v.
PETER W. WEBER AND RAY S. FISHER, DEFENDANTS

Appearances:

DAVID M. SATZ, Jr., Esq., United States Attorney,
By: RICHARD A. LEVIN, Assistant United States Attorney,
For the United States of America.

LORENTZ and STAMLER, Esqs.,
By: JOSEPH H. STAMLER, Esq.,
For Defendant, Ray S. Fisher.

COOLAHAN, District Judge:

This Court by way of written opinion filed held the indictment against defendant Ray S. Fisher must be dismissed. Pursuant thereto an order was entered and docketed on March 5, 1965. On March 23, 1965 notice of motion seeking a petition for rehearing on behalf of the United States was filed. The grounds alleged for the rehearing were based on the Government's contention that an inaccuracy existed between the reporting of 29 U.S.C. § 521 and the statute as originally enacted and contained in the Statutes at Large (73 Stat. 519, 539). It is urged that this discrepancy undermines the rationale of the Court's

original opinion to such an extent as to require reconsideration.

In addition the Government seeks to reargue the decision in the original opinion pertaining to the grant of immunity to a witness testifying before a Grand Jury under subpoena.

To dispose of the latter contention first, suffice to say that no new material or case law was presented to this Court on behalf of the Government in its bri[illegible] or on oral argument. Consequently the Government's second point seeking reconsideration of the Court's original opinion as to the scope of the immunity granted by 15 U.S.C. § 49 and its applicability to a witness testifying pursuant to a Grand Jury subpoena must be denied. It was improvident action on the part of the Government to attempt to raise this point in the absence of any new authority or line of persuasion.

The Government now contends that the Secretary of Labor has no power to investigate violations of 29 U.S.C. § 186. That section of the code embodies Section 302 of the Taft-Hartley Act as amended by Section 505 of the Landrum-Griffin Act. They reason that since investigations of Taft-Hartley violations have always been the province of the Department of Justice under 5 U.S.C. § 300 there was no transfer of this authority by the subsequent amendments. Therefore, the purported delegation of authority to investigate Taft-Hartley Act violations delegated by the Secretary of Labor in the Memorandum of Understanding entered into between the Departments of Labor and Justice exceeded any powers ever granted to the Secretary.

Section 601(a) of the Act confers upon the Secretary the power to investigate violations of "any provisions of this act." In the Statutes at Large (73

Stat. 519, 539) "amendments made by this act to other statutes" was specifically excepted from the objects of this grant. Such language did not appear in 29 U.S.C. § 521(a). The Government contends that this exception includes Section 505 of the Act which in turn amended Section 302 of the Taft-Hartley Act and accordingly all such investigatory power remained with the Department of Justice.

It is the position of the Government that the error in the United States Code upon which both counsel and the Court originally relied, coupled with the language of the Memorandum of Understanding is responsible for the confusion and the result which allegedly emanated therefrom.

The defendant Fisher states that the motion filed by the Government is merely a delaying tactic and is untimely filed pursuant to the rules and case law.

In response to these allegations there has been no bad faith demonstrated on the part of the Government. On the contrary, the motion appears to be an attempt to raise additional material in this forum so as to complete the record for possible appellate review. The timeliness of the motion in considering the date the order was docketed is in accord with allowable limitations. *United States* v. *Healy*, 376 U.S. 75 (1964).

In order for this Court to accept the Government's present position on this motion for rehearing, it would be necessary to declare the Memorandum of Understanding entered into between two Federal Administrative Agencies and officially executed by their heads (Officers of Cabinet Rank) as a complete nullity founded upon insufficient authority. The Government does not in any way deny that the departments function pursuant to this Memorandum of Understanding nor do they claim to have altered or changed their course of action because of this alleged dis-

crepancy. In point of fact they candidly admit that all parties concerned were totally unaware that the alleged difference in language existed.

When considering the above statements in regard to the policy of the United States Supreme Court and general considerations of fair play as exemplified by the cases cited in this Court's original opinion, it is difficult to determine how this Court could change its original conclusion by virtue of the material presented herein. The character and nature of the conduct of the officials involved and its effect on the defendant remains the same. The particular statute under which the Government now claims the investigatory power belongs solely to the Department of Justice was first and has been consistently interpreted by them to be within the province of the Secretary of Labor. It is not clear that the difference in language is of such a substantial nature so as to deprive the defendant of the immunity granted to him under the Act, nor is it of such restrictive language that it becomes clear that entire investigation was merely directed at Taft-Hartley violations alone. To look back on the Government's original contention they claimed to have been investigating "fraud" cases. This flies in the teeth of their current position based upon the revelation of the language discrepancy.

In light of the factual history of this case and the quality of the material alleged as the basis for rehearing it is the opinion of this Court that the original opinion and decision must stand as pronounced. Accordingly the Government's motion is denied.

Let an appropriate order be submitted.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Criminal No. 146–62

ORDER

UNITED STATES OF AMERICA, PLAINTIFF

vs.

PETER W. WEBER AND RAY S. FISHER, DEFENDANTS

This matter being opened to the Court upon the application of the United States of America by David M. Satz, Jr., United States Attorney (Richard A. Levin, Assistant United States Attorney appearing), in the presence of Lorentz and Stamler, Esqs. (Joseph H. Stamler, appearing), attorneys for defendant Ray S. Fisher, and the application on behalf of the United States of America being for rehearing of a Motion heretofore made herein by the defendant for the dismissal of the Indictment against the defendant Ray S. Fisher, an Order having been entered ordering the dismissal, and the Court having considered the Petition and Affidavit of the United States of America and its Brief and having considered the Brief of defendant, and the Court having heard oral argument on the various grounds urged by the United States of America, and the Court having rendered an Opinion on July 2, 1965 determining that the original Opinion and decision stand as pronounced it is on this 21st day of July, 1965.

ORDERED that the Government's Motion to set aside the Order of the Court heretofore entered dismissing

the Indictment against Ray S. Fisher be and it is hereby denied.

/s/ JAMES A. COOLAHAN /s/,
U.S.D.J.

The undersigned consent to the form of the within Order.

UNITED STATES OF AMERICA,
By DAVID M. SATZ, Jr.,
United States Attorney.

By /s/ Richard A. Levin /s/,
RICHARD A. LEVIN,
Assistant United States Attorney.

LORENTZ AND STAMLER,
Attorneys for Defendant Ray S. Fisher.

By /s/ Joseph H. Stamler /s/,
JOSEPH H. STAMLER,
A Member of the Firm.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 700

UNITED STATES OF AMERICA,
Appellant,

vs.

RAY S. FISHER,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

MOTION TO DISMISS OR AFFIRM

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Supreme Court of the United States

OCTOBER TERM, 1965

No. 700

UNITED STATES OF AMERICA,

Appellant,

v.

RAY S. FISHER,

Appellee.

ON APPEAL FROM UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

MOTION TO DISMISS OR AFFIRM

Appellee Ray S. Fisher pursuant to Rule 16 moves before this Court to dismiss the Appeal taken by appellant, United States of America, or, in the alternative, to affirm the Orders of the United States District Court for the District of New Jersey dismissing the Indictment against defendant Ray S. Fisher.

Introductory Statement

(References are herein made as follows: "JS" refers to the Jurisdictional Statement of appellant, United States of America; "Tr" refers to the transcript of the Hearing on the Motion to Dismiss.)

The Motion to Dismiss the appeal is based upon the ground that appeal was not timely taken. The Motion to Affirm is based upon the ground that the question presented in the Jurisdictional Statement and the argument in support thereof does not raise a substantial question. Although appellee in presenting his case to this Court, if this Court were to take jurisdiction, could by brief and oral argument resist in broad detail what appellant may say, the appellant is bound by the limitations of its Jurisdictional Statement and can raise no other new points. Therefore, on this motion, our attention is directed solely to the position of the appellant as set forth in the Jurisdictional Statement. It appears from the question posed by appellant that the question raised is so unsubstantial as not to require oral argument in the Supreme Court.

I

The appeal has not been taken in time and should be dismissed.

On April 29, 1964, the District Court heard argument on the Motion of defendant, Ray S. Fisher, to dismiss the Indictment as against him (Tr-1; 4/29/64). On June 23rd and June 24, 1964 the Court heard live testimony in support of defendant's Motion (Tr-1; 6/23/64).

On February 11, 1965, the Court filed its Opinion (JS-29) and on February 26, 1965, entered its Order in conformity with the Opinion (JS-29). This Order was presented to the Court by attorneys for the defendant with the consent of the United States Attorney affixed.

For some reason presently unknown to counsel, the Clerk of the United States District Court for the District of New Jersey did not perform his ministerial act of noting on the docket the entry of the Order until six days later, on March 4, 1965 (JS-1).

General Rule 10 of the Rules governing the United States District Court for the District of New Jersey provides that a Motion for re-argument shall be made within fourteen days "after the filing of the court's determination of the original Motion and upon the same notice required for the original Motion."

Whatever date we use to establish the running of the time for the rehearing, United States of America, out of time, on March 23, 1965 moved for re-argument. If the starting date is the date of the Court's Opinion, the fourteen days would have expired on February 25th. If the starting time is the date of the Order dismissing the Indictment, the fourteen days would have expired on March 12th. If the docketing date of the Order is used as the starting date, the fourteen days would have expired on March 18th. Notwithstanding the foregoing, the Court did entertain the motion for the rehearing, received briefs and heard oral argument on April 12, 1965. (We note that the Jurisdictional Statement filed by the Government states "an Order denying a petition for rehearing was entered on July 26, 1965" (JS-2). This statement is inaccurate as fully appears by the Order itself (JS-35). A more accurate description of this document is: an Order was entered, after briefs and full argument, denying the Government's Motion to set aside the Order of the Court theretofore entered dismissing the Indictment against Ray S. Fisher (JS-35 to 36).)

After receiving the briefs on the Motion for rehearing and re-argument, and having heard oral argument, the Court on July 2, 1965, rendered a formal written opinion determining that "the original Opinion and decision stand as pronounced" (JS-34). The Order was then prepared by the United States Attorney, consented to by counsel for the defendant and was thereafter signed by the trial judge

on July 21, 1965 (JS-35). Five days later, on July 26, 1965, the Clerk performed his ministerial act by noting in his docket the Order of the Court dated July 21, 1965. We do not know why it took the Clerk five days to make the notation.

The United States filed its Notice of Appeal to this Court on August 25, 1965. The time for taking an appeal to this Court is thirty days.

Rule 11(2) of this Court provides: "*An appeal permitted by law from* a District Court to this Court in a criminal case shall be in time when the Notice of Appeal prescribed by Rule 10 is filed with the Clerk of the District Court *within thirty days after entry of the judgment or order appealed from.*" The "*appeal permitted by law*", referred to in Rule 11, is provided for by the Statute as follows: "The appeal in all such cases shall be taken *within thirty days after the decision or judgment has been rendered* and shall be diligently prosecuted." (18 U. S. C. 3731) (Emphasis supplied) Does the time to appeal start to run from July 2, 1965 (the date of the formal opinion of the Court) or from July 21, 1965 (the date the Court below entered its order). In either case the Notice of Appeal filed by the United States on August 25, 1965 is out of time. In fact the copy of the Order bears the following stamp: "ORIGINAL FILED JULY 21, 1965—MICHAEL KELLER, JR., CLERK".

If argument is to be made that the Statute, 18 U. S. C. 3731, is inconsistent with Supreme Court Rule 11 and that the time begins to run from the ministerial notation of a clerk (July 25, 1965), the Rule must fall.

The appeal is perfected by filing a Notice of Appeal with the Clerk of the District Court. This time cannot be extended (Rule 45 b), Rules of Criminal Procedure). There are cases which hold that on an oral judgment or opinion,

the Clerk's docket entry on the day of the oral judgment or opinion may or may not be the date from which the appeal time starts to run. Apparently this varies from district to district and perhaps from case to case. See *U. S.* v. *Hark,* 320 U. S. 531, 64 S. Ct. 359, 88 L. Ed. 290, rehearing denied, 321 U. S. 802, 64 S. Ct. 517, 88 L. Ed. 1089. It has been held that where a Clerk or Deputy Clerk notes in his docket the oral opinion of the Court the practice in some districts has been to hold that the time starts to run from the signing of the formal order and not the earlier ministerial notation by the Clerk. Certainly the running of the time could not start with the delayed, simple ministerial act of the Clerk or Deputy Clerk days after a final order has been signed by the Judge. It is apparent that this would then leave in the hands of a Clerk or his assistant a determination of when, for his own good purpose or bad purpose, he may, by his notation, start the running of time for appeal.

We again call to the Court's attention that the latest of the two Orders presently appealed from were presented to the Court by the United States Attorney and that this Order was signed by the Judge on July 21, 1965. In fact and in law the pronouncement of the Court's judgment was the signing of the formal Order and this fixed the date from which the time for appeal ran.

The right of the Government to take the appeal in the case at bar is granted to it solely by the Statute (18 U. S. C. 3731). This Court has ruled that the Statute in question should be "narrowly and strictly construed." *U. S.* v. *Mersky,* 361 U. S. 431, 80 S. Ct. 459, 4 L. Ed. 2d 423. This right granted to the United States is an exceptional right and should be strictly limited to the precise language of the Statute which creates that right. *U. S.* v. *Keitel,* 211 U. S. 370, 29 S. Ct. 123, 53 L. Ed. 230 and *U. S.* v. *Borden Co.,* 308 U. S. 188, 60 S. Ct. 182, 84 L. Ed. 181. On rare

and exceptional occasions this Court, pursuant to its Rule 2, has extended the ten day period for a defendant who had failed to file his Notice of Appeal in due time. Such extension, however, has always been directed exclusively to a defendant and his right of appeal under the rules and has been based upon a showing of good cause, excusable neglect or "fairness". We find no case where this Court has extended, pursuant to Rule 2 or any other Rule, the statutory period as established by Congress for "appeal by United States" (18 U. S. C. 3731). In any event the Government has not shown any excusable neglect even if it were appropriate to make such a showing.

It is respectfully submitted that the appeal presently noticed by the United States of America is untimely and should be dismissed.

II

The question presented in the jurisdictional statement is unsubstantial.

The United States of America in its Jurisdictional Statement (JS-6 to 9) sets forth what it considers to be facts developed by the testimony taken and the exhibits presented on the Motion to dismiss the Indictment. For the purposes of this Motion and solely for the purposes of this Motion we will accept the Government's version.

The defendant had every right to rely upon the formal compact between the Departments of Labor and Justice. There can be no doubt from what was said before the Grand Jury by the United States Attorney and the advice which was given to the defendant by his counsel, that if he testified before the Grand Jury, immunity would attach (Tr. 73 to 78). The United States of America in its brief

and in summation in resisting the Motion to Dismiss asserted the validity of the Memorandum of Understanding. It was not until after the Court ordered the dismissal of the indictment that the United States Attorney took the position on rehearing that the Memorandum of Understanding signed by the Attorney General of the United States and by the Secretary of Labor was a nullity. The United States supported its argument on the original motion to dismiss with cases which urged the validity of the Memorandum of Understanding. See *Goldberg* v. *Battles*, 196 F. Supp. 749 (E. D. Penn. 1961), affirmed 299 F. 2d 937 (3rd Cir. 1962), cert. den. 371 U. S. 817 and *In re Certain Grand Jury Witnesses*, 211 F. Supp. 365 (E. D. Mich. 1962). The Government should not be heard to take a position at this late date that a formal agreement between the Attorney General and the Secretary of Labor duly published for the information of the world, including this defendant, is a nullity. This agreement was entered into during the administration of President Eisenhower by the then Secretary of Labor, James P. Mitchell and by the then Attorney General, Wililam P. Rogers. Thereafter, the same Memorandum of Understanding was re-affirmed and made use of during the administration of President Kennedy, by the then Secretary of Labor, Arthur J. Goldberg and the then Attorney General, Robert F. Kennedy. It continues to be in force today as a compact between Secretary of Labor Wirtz and Attorney General Katzenbach. Can the Department of Justice in its present appeal by the Solicitor General be acting in good faith when it takes the position that the Secretary of Labor had no power to delegate the investigation to the Department of Justice? Are not attorneys, defendants, respondents and citizens in general entitled to rely upon the published, documented agreements between the highest officials in Government as they are set forth in the Federal Register (25 F. R.

1708) by way of notice to the world pursuant to Section 3 of the Administrative Procedures Act (5 U. S. C. 1002).

Although the Government now argues that the agreement between the Department of Justice and the Department of Labor is a nullity, there must always exist a presumption of regularity in the proceedings of public officials and especially is this so when it is one of the public officials who questions the irregularity in his own Department. The burden is upon the Government to clearly show otherwise to overcome this presumption. When the Government undertakes an obligation in broad terms on which individuals have a reasonable right to rely, the Government should not seek to have the doubts created by both the Department of Justice and the Department of Labor resolved in it own favor against the private citizen who has taken the Departments at their word. There should be no room for anyone to doubt that when the various Departments of the Government enter into contract or agreements that they will adhere strictly to terms of same. This should especially be so in a criminal matter.

Assuming *arguendo* that the Department of Justice and the Department of Labor had no authority and that their joint contractual obligation was a nullity, the immunity still must attach in this case, for if we adopt the view now taken by the Government a very serious doubt would be cast upon the traditional notions of fair play. The Government's position that immunity would attach in a hearing before the Labor Commissioner or some other administrative person such as a Hearing Officer, or a Deputy and that it would not attach when the witness appeared under Subpoena in response thereto before a Grand Jury with the United States Attorney present is somewhat ludicrous.

This Court on many occasions has urged that the prosecution be precluded from establishing a trap for the unwary and has also forbidden the prosecution from "whip saw" tactics. *Murphy* v. *Waterfront Commission*, 378 U. S. 52. To accept the Government's position in the case at bar would be to permit the United States Attorney in the formal procedure before a Grand Jury to deprive a witness of his constitutional prerogatives, notwithstanding the fact that had a lower level investigation been conducted by a lesser official than the United States Attorney immunity would automatically be conferred.

In the *Murphy* case this Court condemned the whip saw process between Federal and State Courts. Should not similar criticism be extended to the whip saw process performed by the Department of Justice in concert with the Department of Labor.

In *U. S.* v. *Pardue, et als.*, 294 F. 2nd, 543 (D. C. S. D. Tex. 1923), the Court had occasion to construe the language contained in the Federal Trade Commission immunity provision (15 U. S. C. 1949). At page 547 the Court said:

> "It by judicial interpretation writes into a statute in derogation of a constitutional right a limitation not therein contained, and which the ordinary mind, to which the statute is addressed, could not have supposed was contained in it. It to an extent follows the Draconian principle of writing the law in characters so fine that no one can read it, and thereby putting the government in a better position to take the unwary ones into its net. It magnifies the fault of the defendant, while it minimizes the bad faith of the government. It puts the seal of condemnation upon the offense against the general laws of which the defendant is charged, but it approves a

> double dealing and evasion on the part of the government in the matter of a man's constitutional protection, which right reason and sound discrimination cannot, in my opinion, sustain."

In *U. S.* v. *Monia,* 317 U. S. 424 (1943) this Court said at page 430:

> "Congress evidently intended to afford Government officials the choice of subpoenaing a witness and putting him under oath, with the knowledge that he would have complete immunity from prosecution respecting any matter substantially connected with the transactions in respect of which he testified, or retaining the right to prosecute by foregoing the opportunity to examine him."

In dealing with the Constitutional rights of a witness before a Grand Jury it is incumbent upon the United States to make sure that the traditional "fair play" doctrine as time and time again restated by this Court is carefully followed.

No substantial question having been raised by the United States of America in its Jurisdictional Statement, the Order of the Court below dismissing the Indictment should be affirmed.

CONCLUSION

Therefore it is respectfully submitted that the appeal should be denied or the order appealed from affirmed.

Respectfully submitted,

LORENTZ AND STAMLER
Attorneys for Appellee
Ray S. Fisher
By JOSEPH H. STAMLER
A Member of the Firm

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 700

UNITED STATES OF AMERICA, APPELLANT

v.

RAY S. FISHER

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO THE MOTION TO DISMISS OR AFFIRM

This memorandum is filed in response to this Court's request to discuss the issue of timeliness raised in appellee's motion to dismiss or affirm.

The order dismissing the indictment against appellee was entered on March 5, 1965. On March 23, the government moved for a rehearing. The motion was entertained by the district court and oral argument was heard on it. On July 6, 1965, the court issued a written opinion (R. 42–45) stating that the motion of the government was in good faith and was filed within allowable time limits[1] but declining to set

[1] Appellee argues that the government's petition for rehearing was untimely under the rules of the district court in question. As noted above, the district court treated it as

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aside the original judgment. The opinion concluded: "Let an appropriate order be submitted" (R. 45). The order contemplated by the opinion was signed by the court on July 21, 1965 (R. 47), filed on July 23, 1965 (a Friday), and entered on the docket on July 26, 1965 (the following Monday). Thirty days after the entry on the docket, the government filed its notice of appeal.

The appeal was timely if the notice was filed "within thirty days after the decision or judgment has been rendered." 18 U.S.C. 3731. Rule 11(2) of the Rules of this Court explains that this means thirty days after "entry of the judgment or order appealed from." It is settled that where the practice is to enter a judgment after an opinion (or where it is made clear that an order will follow) it is the judgment or order, not the opinion, from which the time to appeal is computed (*United States* v. *Hark,* 320 U.S. 531; *United States* v. *Midstate Co.,* 306 U.S. 161), and that where a timely petition for rehearing (see n. 1, *supra*) is filed within the permissible time for appeal the time to appeal runs from the order denying the petition for rehearing (*United States* v. *Healy,* 376 U.S. 75, 77–80). Under these well settled principles, it is clear that the government's notice of appeal in this case was timely filed.

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timely. Whether the court was correct or not in so treating it is irrelevant. Where, as here, "the court allows the filing [of an untimely petition for rehearing] and, after considering the merits, denies the petition, the judgment of the court as originally entered does not become final until such denial, and the time for appeal runs from the date thereof." *Bowman* v. *Loperena,* 311 U.S. 262, 266.

Petitioner argues that since 18 U.S.C. 3731 refers to the day the decision or judgment is "rendered", the day the order is signed is controlling. This reading, however, is refuted by Rule 11(2), which fixes "entry" of the judgment as the controlling date. The rule, in our opinion, particularizes rather than contradicts the statute; but, assuming there is a conflict, the rule must prevail. The period set by the rule is incorporated by reference in Rule 37(b) of the Federal Rules of Criminal Procedure.[2] Those rules "prescribe the times for and the manner of taking appeals" (Criminal Appeals Rules Act (1933), 47 Stat. 904, 18 U.S.C. 3772), and when the rules became effective "all laws in conflict therewith" were thereupon "of no further force" (Rules Act, *supra*)—including (to the extent there may be any conflict) 18 U.S.C. 3731.[3] Accordingly, this Court has always deemed timeliness controlled by the date of entry, rather than the date of signing, of the order appealed from.[4]

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[2] This portion of Rule 37(b) is unchanged by the recent revisions of the criminal rules. Compare p. 4, *infra*.

[3] Section 3731 derives from 34 Stat. 1246, enacted in 1907—long before the Rules Act.

[4] See *United States* v. *Healy*, *supra*, where this Court found the date of the denial of a petition for rehearing to be November 8 (376 U.S. at 77)—the day the order was filed and entered on the docket (Record, No. 64, O.T. 1963, p. 2)—rather than November 5, the date the order was signed (*id.*, p. 12); and *United States* v. *Midstate Co.*, *supra*, where this Court found that the time for filing the notice of appeal ran from July 2 (306 U.S. at 163, n. 2)—the date the order was filed and entered on the docket (Record, No. 287, O.T. 1938, p. 1)—rather than June 23, the date the order was signed (*id.*, p. 28).

The only other question is whether the order denying the petition for rehearing was "entered," within the meaning of Rule 11(2), on the day of filing or the day of docketing.[5] The usual meaning of the term "entry" is entry in the clerk's docket—the notation by which public notice is given of the contents of the files and the status of the case. The Civil Rules, in using the term in a like context, expressly adopt this meaning (see Rule 58, F.R. Civ. P.). Thus, where a written order is issued in a civil case, the clerk's notation of the order in the docket fixes the date from which the time to appeal runs (see *United States* v. *Schaefer Brewing Company,* 356 U.S. 227). Similarly, Rule 37(a)(2) of the revised Criminal Rules explains that, for purposes of fixing the time within which the government must file a notice of appeal to a court of appeals, "30 days after entry of the judgment or order" means thirty days after its entry in the criminal docket.[6] We submit that the term "entry" in Rule 11(2) should likewise be interpreted to mean the docketing of the order. The government's notice of appeal was therefore timely.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

APRIL 1966.

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[5] In the present case, a week-end intervened between filing and docketing, and the appeal would be untimely if the day of filing controls.

[6] This gloss was added to resolve any doubt on the point, not to change existing law. Advisory Committee's Note (4).

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vs.

RAY S. FISHER,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

REPLY MEMORANDUM OF RAY S. FISHER ON MOTION TO DISMISS OR AFFIRM

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ON APPEAL FROM UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

REPLY MEMORANDUM OF RAY S. FISHER ON MOTION TO DISMISS OR AFFIRM

The Solicitor General has filed a Memorandum on behalf of the United States in opposition to the Motion to Dismiss or Affirm. His answering memorandum is limited solely to the issue of timeliness.

A brief reply is necessary because of what appears to be a concession in the Memorandum of the Solicitor General. We have this day spoken to the Deputy Clerk of the

Supreme Court of the United States who advises us that the original Order signed by the Court below on July 21, 1965 has noted in the upper left hand corner a stamp stating that the original order was filed at 10:40 A.M. on July 23, 1965. (On our copy which is before me at the time this Brief is written, the stamp of the Clerk appears as "Original filed July 21, 1965.")

The appellant concedes that its "appeal would be untimely if the day of filing controls". (Answering Memorandum of Solicitor General, p. 4, note 5.)

Therefore appellant finds itself forced to rely on the ministerial notation of the Clerk made on July 26, 1965. The appellant cites no case to support its position and attempts to draw an analogy from the Rules of Civil Procedure.

Such analogy is inappropriate. The Federal Rules of Civil Procedure recognize that the appeal is most frequently taken from a judgment signed by the Clerk of the Court. (See 1965 Supplement Volume 6, *Moore's Federal Practice*, 2nd edition, Section 58.02, page 105.) In civil cases the final judgment from which an appeal may be taken under Rule 58 may and is in most cases a document signed by the Clerk and not the Judge. This is not so in a judgment in a criminal matter, for in criminal causes the judgment is signed by the Judge and not by the Clerk. As was said in *U. S.* v. *Hark*, 320 U. S. 531, at 534:

> "The judgment of a Court is the judicial determination or sentence of the Court upon a matter within its jurisdiction. No form of words and no peculiar formal act is necessary to evince its rendition or to mature the right of an appeal."

And further in *Hark, supra,* this Court said at p. 534:

> "Where, as here, a formal judgment is signed by the judge, this is prima facie the decision or judgment rather than a statement in an opinion or a docket entry."

Rule 58 of the Federal Rules of Civil Procedure specifically notes what shall be contained in a judgment and refers to Rule 79 which defines the "civil docket". No such comparable Rule appears in the Rules of Criminal Procedure.

The Government takes a position that the ministerial entry by the Clerk on July 26, 1965 should be the governing date for beginning its calculation of time within which to appeal. We respectfully call the Court's attention to the fact that the Notice of Appeal filed by the Government in this case was marked filed on August 25, 1965 but the Clerk did not note its entry on the docket until August 27. Therefore, if the Government is successful in persuading this Court that the Clerk's ministerial docket entry is the all important date, then the appeal is still out of time for the docket entry on the filing of the Notice of Appeal was not made until Friday, August 27, 1965. We do not believe it should be left for the Clerk to determine when a right of appeal in a criminal matter should arise. If it is to be the Clerk's entry on one side of the time period, as the Government argues it should be, then it must be the Clerk's entry on the other end of the time period.

As was said by this Court in *U. S. v. Healy*, 376 U. S. 75, 80:

> "No persuasive considerations of policy dictate a deviant standard for government appeals."

If uncertainty and confusion arise in this case, it has been caused by the failure of the Government to act in timely fashion. If there are doubts created, they should be resolved in defendant's favor. The only way to eliminate uncertainty and confusion which may arise as a result of the Government's position in the case at bar is to hold that the date *when the Judgment is signed by the Court and is filed* governs the beginning of the time period and the day when the Notice of Appeal *is filed* governs the termination of the time period.

We respectfully submit that the Motion to dismiss the appeal be granted.

Respectfully submitted,

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